No. 82-1261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STANDARD-COOSA-THATCHER CARPET YARN DIVISION, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM FOR RESPONDENT UNION IN OPPOSITION

ARTHUR M. GOLDBERG
BARBARA JANE CAREY
15 Union Square
New York, N.Y. 10003
(212) 242-0700

GEORGE KAUFMANN
(Counsel of Record)
2101 L Street, N.W., #1000
Washington, D.C. 20037
(202) 296-1294

Attorneys for Respondent Union

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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DISCUSSION

1. Petitioner seeks review of a decision of the Court of Appeals enforcing an order of the National Labor Relations Board ("the Board") requiring petitioner to bargain with respondent union. The Board entered this bargaining order to remedy a series of unfair labor practices committed by petitioner, but not identified in petitioner's Statement of the Case. (Pet. 4-5).[1] Petitioner's violations of the National Labor Relations Act ("NLRA") are, however, described in the "Statement" appearing in the Brief for the National Labor Relations Board in Opposition (pp. 2-4), and we shall not reiterate that de-

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[1] "Pet." will refer to the Petition for Writ of Certiorari in this case. Citations beginning with the letter "A" will refer to the separately bound Appendix to the Petition.

scription or the remainder of the Board's Statement (*id.* pp. 5-7).[2]

2. Petitioner's failure to describe the misconduct on which the bargaining order is based exemplifies the abstract nature of the issue which it presents for review. Petitioner does not contend that the Board abused its discretion in entering that order; plainly the merits of such a contention would depend on the nature of the underlying unfair labor practices. Rather, petitioner objects that the Board did not adequately explain the exercise of its discretion in entering that order. That contention is utterly unworthy of this Court's consideration (cf. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 491; *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503), and is, in any event, utterly without substance.

Petitioner asserts that the decision below is inconsistent with *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (*"Gissel"*) (Pet. 6-7). In the passages quoted by petitioner, this Court set forth the substantive standards which the Board must follow in determining whether a bargaining order should issue to remedy "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." (395 U.S. at 614.) At no point did the *Gissel* opinion prescribe special requirements of clarity or specificity when the Board issues a bargaining order. Thus, petitioner's assertion of a departure from *Gissel* is baseless.

The standards of clarity and specificity to which bargaining orders are subject derive not from *Gissel*, but from well-established principles of administrative law which apply to all Board remedial orders, entered pursuant to § 10(c) and judicially reviewable under §§ 10(e) and (f) of the National Labor Relations Act ("NLRA").

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[2] The Board's unfair labor practice findings were approved by the Court of Appeals (Pet. A 3-A 20) and are not challenged here.

The leading case is *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177:

> The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board. [313 U.S. at 197] [3]

In this case the Board's discussion of its choice of a bargaining order as a remedy covers more than two pages of its Decision as reproduced in the Appendix to the Petition (Pet. A 31-A 33). The Board approved the Administrative Law Judge's finding that:

> "Respondent's conduct had 'the tendency to undermine [the Union's] majority strength and impede the election processes,' that the continuing impact of Respondent's coercive conduct renders a fair elec-

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[3] See also *SEC v. Chenery Corp.*, 318 U.S. 80, where, after quoting from his opinion for the Court in *Phelps Dodge, supra*, Justice Frankfurter continued:

> In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commision must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained. [318 U.S. at 95.]

> tion unlikely, and that the authorization cards signed by employees are a more reliable indication of their desire for representation." [Pet. A 31, quoting Pet. A 98, which had quoted *Gissel*, 395 U.S. at 614]

The Board also described the unfair labor practices and their impact on the employees' freedom of choice (Pet. A 31-A 33). It therefore concluded that "the respondent's unlawful activities warrant a bargaining order under *Gissel*" (Pet. A 33).

"All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." (*Phelps Dodge*, *supra*, 313 U.S. at 197). No one who reads the Board's decision in this case can fairly deny that it has complied with this requirement.[4]

3. Petitioners assert that the decision below (and those of other Courts of Appeals) "are directly inconsistent with decisions in the First, Sixth, Seventh, Ninth and Tenth Circuits, which have interpreted *Gissel* as requiring the Board to analyze and articulate the appropriateness of a bargaining order." (Pet. 11) But in this case the Board *did* "analyze and articulate the appropriateness of a bargaining order (*id.*) And the Court of Appeals, far from giving "perfunctory deference to the Board's choice of remedies in the instant case" (Pet. 7), carefully examined the Board's decision (Pet. A 21-A 22) and satisfied itself that the Board's "statement of reasons is sufficient to permit review and hence withstands the

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[4] The thoroughness of the Board's analysis of the remedial issue in this case contrasts favorably with that which was unsuccessfully challenged in *Shepard v. NLRB*, —— U.S. ——, 51 U.S.L.W. 4087, decided January 18, 1983. The Board's "explanatory paragraph" of the exercise of its remedial discretion in that case struck the Court "as something less than a model of precise expository prose" (Slip Op. pp. 5-6, 51 U.S.L.W. at 4089. Nevertheless, applying *Phelps Dodge*, *supra*, this Court affirmed the Board's decision, because it could divine "the sense of the Board's explanation" and the Board's conclusion "was justifiable" (Slip Op. p. 6, 51 U.S.L.W. at 4089).

Company's procedural challenge." (Pet. A 22)[5] Petitioner's claim of an intercircuit conflict proceeds from a wholly inaccurate characterization of the decision below.

To be sure, petitioner is able to point to some decisions of some courts of appeals in which a bargaining order was reversed. In certain of these the court of appeals had also reversed some of the unfair labor practice findings on which the Board had based its bargaining order. In others, it appears that the court of appeals did, contrary to this Court's teachings, "stick in the bark of words" (*SEC v. Chenery Corp.*, 318 U.S. at 89, quoted at p. 3, n.3, *supra*). But even if a conflict of decisions for purposes of this Court's Rule 17 could be established by a "color-matching of cases" (cf. *Reck v. Pate*, 367 U.S. 433, 442), we are aware of no case in which a bargaining order was denied enforcement where the underlying unfair labor practice findings (including a threat to close the plant, Pet. A 32, n.7) have been affirmed in full, and the Board has given as careful an explanation of the exercise of its discretion as it has provided here.

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[5] The Court also concluded that "the order also comports with the applicable evidentiary and substantive standards and lies well within the Board's discretion." (Pet. A 22) Petitioner does not seek review of that determination.

CONCLUSION

For the foregoing reasons and those stated in the Brief for the National Labor Relations Board in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR M. GOLDBERG
BARBARA JANE CAREY
15 Union Square
New York, N.Y. 10003
(212) 242-0700

GEORGE KAUFMANN
(Counsel of Record)
2101 L Street, N.W., #1000
Washington, D.C. 20037
(202) 296-1294

Attorneys for Respondent Union